

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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MARCUS RONALD SWALLOW,

Plaintiff,

V.

MIGUEL PANTELAKIS, *et al.*,

Defendants.

Case No. 3:23-cv-00227-ART-CLB

ORDER DENYING MOTION TO
DISMISS (ECF NO. 12) AND
MOTION TO APPLY EQUITABLE
TOLLING (ECF NO. 25)

Plaintiff Marcus Ronald Swallow brings this action under 42 U.S.C. § 1983 against Defendants Miguel Pantelakis, Matthew Ulm, and Luis Perez alleging that Defendants used excessive force while arresting him by firing at him over 47 times without identifying themselves as police officers. Before the Court is a Motion to Dismiss (ECF No. 12) by Defendants arguing that Mr. Swallow's claim is barred by the applicable statute of limitations, NRS 11.190(4)(e), and a Motion to Apply Equitable Tolling (ECF No. 25) by Mr. Swallow. Because Mr. Swallow has raised a colorable claim for equitable tolling, the Court finds dismissal inappropriate at this time.

Mr. Swallow complains of Defendants' use of excessive force during an arrest that occurred on March 12th, 2020. (ECF No. 7 at 3.) He filed his initial complaint with this Court on May 30, 2023. (ECF No. 1-1.) Federal courts apply state statutes of limitations to § 1983 claims, *Lockett v. County of Los Angeles*, 977 F.3d 737, 740 (9th Cir. 2020), and Nevada's statute of limitations for claims such as Mr. Swallow's is two years, NRS 11.190(4)(e); see also *Rosales-Martinez v. Palmer*, 753 F.3d 890, 895 (9th Cir. 2014) ("in the absence of a federal provision for § 1983 actions, the analogous [Nevada] state statute of limitations for personal injury claims applies."); *Perrez v. Seavers*, 869 F.2d 425 (9th Cir.

1 1989). Mr. Swallow's alleged injury occurred on March 12, 2020, so NRS
 2 11.190(4)(e) bars any claim brought after March 12, 2022. Since Mr. Swallow
 3 filed his complaint with this court on May 30, 2023, his claim will only survive
 4 dismissal if equitable tolling applies.

5 Mr. Swallow raises two grounds for equitable tolling. First, he argues that
 6 he failed to file his claim because he was under the false impression that he was
 7 barred from filing until his underlying criminal proceedings had ended, which
 8 occurred in February 2023. (ECF No. 17 at 1-2.) Second, he argues that the
 9 COVID prison lockdown meant he was unable to access the prison law library
 10 for 16 months, from March 12, 2020 to July 14, 2021, rendering him unable to
 11 file a claim during that time. (ECF No. 25 at 1-3.) During the lockdown, Mr.
 12 Swallow made multiple attempts to gather information related to his claim,
 13 including by contacting a courthouse, sending letters to the prosecutor in his
 14 criminal case, and having a non-incarcerated friend call that prosecutor's office.
 15 (*Id.* at 2-3.) Defendants respond that Mr. Swallow's mistaken belief about filing
 16 requirements is not grounds for equitable tolling and that Mr. Swallow has failed
 17 to demonstrate "diligence," as required under Nevada law, because he waited an
 18 additional two years to file his claim. (ECF No. 29 at 4, 6-7.)

19 Federal courts look to state law to determine whether equitable tolling
 20 applies to § 1983 claims. *Lockett*, 977 F.3d at 740. In order to apply equitable
 21 tolling, Nevada courts require a plaintiff to show "(1) that he has been pursuing
 22 his rights diligently, and (2) that some extraordinary circumstances stood in his
 23 way." *Id.* (citing *Kwai Fun Wong v. Beebe*, 732 F.3d 1030, 1052 (9th Cir. 2013)).
 24 In determining the above, courts consider the following nonexclusive factors:

25 the diligence of the claimant; the claimant's knowledge of the
 26 relevant facts; the claimant's reliance on authoritative statements
 27 by the administrative agency that misled the claimant about the
 28 nature of the claimant's rights; any deception or false assurances on
 the part of the employer against whom the claim is made; the
 prejudice to the employer that would actually result from delay
 during the time that the limitations period is tolled; and any
 other equitable considerations appropriate in the particular case.

1 *Fausto v. Sanchez-Flores*, 482 P.3d 677, 681 (Nev. 2021).

2 Generally, questions of equitable tolling cannot be decided on motions to
 3 dismiss. *Supermail Cargo, Inc. v. U.S.*, 68 F.3d 1204, 1206 (9th Cir. 1995)
 4 (“Because the applicability of the equitable tolling doctrine often depends on
 5 matters outside the pleadings, it is not generally amenable to resolution on a
 6 Rule 12(b)(6) motion.”) (internal quotation marks omitted). “A motion to dismiss
 7 based on the running of the statute of limitations period may be granted only if
 8 the assertions of the complaint, read with the required liberality, would not
 9 permit the plaintiff to prove that the statute was tolled.” *Id.* (internal quotation
 10 marks omitted). A court may not dismiss a complaint “unless it appears beyond
 11 doubt that the plaintiff can prove no set of facts that would establish the
 12 timeliness of the claim.” *Id.* Equitable tolling is typically a “fact-intensive” inquiry
 13 that “is more appropriately [considered] at the summary judgment or trial stage
 14 of litigation.” *Cervantes v. City of San Diego*, 5 F.3d 1273, 1276 (9th Cir.
 15 1993)(citations omitted).

16 Because Mr. Swallow has stated a colorable claim for equitable tolling,
 17 dismissal based on NRS 11.190(4)(e) is inappropriate. Mr. Swallow claims that
 18 he lacked access to a law library for sixteen months during the height of the
 19 COVID-19 pandemic, while on lockdown in a Utah State Prison, and his diligent
 20 attempts to get information failed. Mr. Swallow claims that things improved in
 21 June 2021 when he was extradited to Nevada and received some discovery. He
 22 fails to explain, however, why it took him nearly two years after June 2021 to file
 23 his complaint. Specifically, he fails to explain whether circumstances outside of
 24 his control kept him from filing and/or whether he acted diligently during that
 25 period.

26 It is therefore ordered that Defendants’ Motion to Dismiss (ECF No. 12) is
 27 denied. It is further ordered that Mr. Swallow’s Motion to Apply Equitable Tolling
 28 (ECF No. 25) is denied without prejudice. In response to any argument in a

1 motion for summary judgment or at trial regarding the application of equitable
2 tolling, Mr. Swallow may renew his arguments and provide additional details, as
3 noted above.

4 Dated this 27th Day of December 2023.

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7 ANNE R. TRAUM
8 UNITED STATES DISTRICT JUDGE
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